Internal Revenue Service (I.R.S.)

Technical Advice Memorandum

Issue: April 25, 1997
January 13, 1997

Section 61 -- Gross Income v. Not Gross Income

61.00-00 Gross Income v. Not Gross Income

61.32-00 Indians

TAM-58435-95

Taxpayer Name:

Taxpayer Address:

Taxpayer Identification No.:

Years Involved:

Date of Conference:

Legend:

Tribe:

Law:

Year 1:

Year 2:

Year 3:

Date A:

Date B:

ISSUE:

Are per capita payments made under the Indian Gaming Regulatory Act excludible from gross income?

CONCLUSION:

No. Per capita payments, which are equal payments to tribal members and are not based on determinations of the recipient's financial status, health, educational background, or employment status, are includible in gross income.

FACTS:

Tribe is a federally recognized Indian tribe organized and operated under a tribal constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 476. Tribe conducts gaming operations on tribal land pursuant to the Indian Gaming Regulatory Act of 1988 (IGRA). Tribe makes per capita (equal) payments to tribal members of a portion of its revenues from class II and class III gaming activities (activities described in § § 4(7)(A)

and 4(8) of IGRA).

Tribe's *** enacted Law to comply with IGRA's revenue allocation plan requirement. Law sets a percentage of revenues to be used for per capita distributions. This percentage was to be applicable until such time as Tribe established *** programs. Law provides for *** programs to be established for housing, education, health and medical care, insurance, and child care. After the establishment of the *** programs, a portion of the funds that would otherwise be used for per capita distributions would be used to fund the programs. Any remaining funds would be used for per capita distributions.

In Year 1, Tribe voted to implement a *** program for the development of housing, education, health and medical care, insurance, and retirement programs. Tribe determined that all tribal members were needy and had been subject to mistreatment and neglect and were therefore eligible to participate. For the period beginning January 1, Year 1, and ending Date A, Year 1, Tribe treated ***% of the per capita payments made to each tribal member as general welfare payments excludable under the general welfare doctrine. The facts provided in the technical advice request indicate that the ***% figure was determined at the time the program was implemented, which was after the payments were made. At the conference, the Tribe's representatives indicated that the ***% was determined before the payments were made.

After Date A, Year 1, members seeking the benefits of the *** program were required to apply by reporting to Tribe the amounts that they anticipated that they would need to pay for qualified expenses and the nature of the expenses. After the end of the calendar year, members who had applied for *** program benefits characterized a portion of the per capita payments they received during the calendar year and used for qualified expenses as *** program payments. In January of Year 2, participating tribal members reported to the *** program the amount that they used for qualified expenses during the period beginning Date B of Year 1, and ending December 31 of Year 1. Similarly, in January of Year 3 and January of Year 4, participating tribal members reported to the program the amounts they used for qualified expenses during the Year 2 and Year 3 calendar years.

Under Tribe's *** program, qualified expenses included expenses for such items as ***

Tribe provided tribal members with Forms 1099-MISC for the Year 1, Year 2, and Year 3 tax years. For the period beginning January 1, Year 1, and ending Date A of Year 1, Tribe treated ***% of all per capita payments as excludable general welfare payments. For the period beginning Date B of Year 1, and ending December 31, Year 3, Tribe treated as an excludable welfare payment the portion of a per capita payment that was designated by the recipient tribal member as used for qualified expenses.

During the years in issue Tribe did not make separate payments designated as *** benefits. Tribe, however, did make per capita payments (equal amounts) to all tribal members, regardless of whether or not they applied for *** program benefits.

LAW

Section 61 of the Internal Revenue Code states the general rule that gross income means all income from whatever source derived. Generally, all income is subject to taxation unless excluded by law. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

The Service has consistently held that payments made under

legislatively provided social benefit programs for promotion of the general welfare are excludable from gross income. This general welfare doctrine applies only to governmental payments out of a welfare fund based upon the recipients' need, and not as compensation for services. See e.g., Rev. Ruls. 57-102, 1957-1 C.B. 26 (payments to the blind), 74-74, 1974-1 C.B. 18 (awards to crime victims or their dependents), 74-205, 1974-1 C.B. 20 (replacement housing payments to aid displaced individuals and families), 75-271, 1975-2 C.B. 23 (assistance payments for lower income families to acquire homes), 76-144, 1976-1 C.B. 17 (grants to those who as a result of a major disaster are unable to meet necessary expenses or serious needs), 76-229, 1976-1 C.B. 19 (trade readjustment allowances), 77-77, 1977-1 C.B. 11 (grants made to Indians and tribes that are unable to obtain adequate financing for an economic enterprise).

On the other hand, the Service has stated that benefits payable regardless of the financial status, health, educational background, or employment status of the recipient are not excludable under the general welfare doctrine. Rev. Rul. 76-131, 1976-1 C.B. 16 (equal payments made regardless of financial status, health, educational background, or employment status, to persons over 65 who have lived in Alaska for 25 years, are includible in gross income of recipients). See also Bailey v. Comm'r, 88 T.C. 1293 (1987), acq. on another issue, 1989-1 C.B. 1, Bannon v. Comm'r, 99 T.C. 59 (1992).

Unless otherwise exempt, tribal income is includible in the gross income of the Indian tribal member when distributed or constructively received by him. Rev. Rul. 67-284, 1967-2 C.B. 55, 58, modified by, Rev. Rul. 74-13, 1974- 1 C.B. 14, amplified by, Rev. Rul. 94-16, 1994-1 C.B. 19. Tribal members, like other citizens, are generally subject to federal income tax, except to the extent that a treaty provision or Act of Congress specifically provides that the income is not subject to tax. Squire v. Capoeman, 351 U.S. 1, 6 (1956). The distributions in the present case are not the subject of a treaty provision, and there is an Act of Congress that specifically recognizes that tribal members are subject to tax on per capita payments. Section 11(b)(3) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2710(b)(3).

Section 11(b)(2)(B) of IGRA provides that net revenues from tribal gaming are not to be used for purposes other than--(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies. Section 11(b)(3) of IGRA sets forth prerequisites for the use of net revenues from class II gaming activities for per capita payments to tribal members. Under § 11(d)(1)(A)(ii) of IGRA, the requirements of § 11(b) also apply to class III gaming activities.

Section 11(b)(3) states that per capita payments are subject to Federal taxation, and tribes must notify members of their tax liability for per capita payments when they are made.

ANALYSIS

In the present case, we note that Tribe made equal payments of gaming revenues to all tribal members, regardless of their personal situations. The Service has held that equal payments made regardless of financial status, health, educational background, or employment status are includible in the gross income of the recipients. Rev. Rul. 76-131. See also Bailey v. Comm'r, 88 T.C. 1293 (1987), and Bannon v. Comm'r, 99 T.C. 59 (1992).

Tribe states that the present case is distinguishable from those

precedents because here the *** payments to each member were not equal. Tribe points to the fact that for periods after Date A of Year 1, each tribal member who received per capita payments designated the portion of the per capita payments that the member used for qualified expenses, and each member designated a different amount.

We do not believe that the portion of the per capita payments that the members designate as used for qualified expenses is relevant to the issue before us. We conclude that because the payments actually made to tribal members were equal (per capita) payments of net revenues from gaming activities and were made regardless of financial status, health, educational background, or employment status, no portion of the payments are excludable from gross income under the general welfare doctrine. Equal (per capita) payments made regardless of these factors cannot be characterized, in whole or in part, as excludable general welfare doctrine payments.

Tribe also points to § 11(b)(2)(B)(ii) of IGRA, which authorizes tribes to use gaming revenues to provide for the general welfare of a tribe and its members. Tribe argues that because IGRA specifies that per capita payments are taxable, but does not specify the tax status of revenues used under § 11(b)(2)(B)(ii) to provide for the general welfare of the Indian tribe and its members, Congress must have intended that those payments would not be taxable. Moreover, Tribe states that IGRA's use of the term "general welfare" is a reference to payments or benefits exempt from tax under the general welfare doctrine of tax law.

We disagree. There is no evidence in the language or legislative history of IGRA that Congress intended that IGRA would affect the otherwise applicable federal tax treatment of distributions to tribal members. Although § 11(b)(3) states that the per capita payments may only be made if they are subject to Federal taxation and tribes notify members of such tax liability when payments are made, that section is consistent with the rules under section 61 of the Code and does not create an inference that all payments to tribal members that are not per capita are exempt from tax. Further, there is no evidence that use of the term "general welfare" in § 11(b)2(B)(ii) of IGRA is meant to refer to the general welfare doctrine of federal tax law.

Finally, Tribe states that IGRA gives the tribes flexibility in formulating their welfare plans and that tribes have the authority to structure their laws to provide for nontaxable general welfare doctrine payments if they wish. Notwithstanding any flexibility that may be granted by IGRA to tribes, our position is that the taxability of payments under the Internal Revenue Code must be determined under federal tax law.

The taxpayer's representatives also raised a question as to how the technical advice provided in this memorandum, if adverse to the taxpayer's position, would affect the further processing of this case. In general, a technical advice memorandum represents a determination by the National Office as to the application of the law to the facts of a particular case. As such, it must be accepted and followed by the District Director, whether the conclusion is favorable or adverse to the taxpayer. However, if a taxpayer who receives adverse technical advice requests that the case be considered by Appeals, Appeals may negotiate a settlement with a result that differs, in whole or in part, from the position in the technical advice memorandum. See IRM 8615 for the procedures to be followed by a taxpayer to request a case be considered by Appeals; see IRM 8(14)40 for the procedures to be followed by Appeals in the consideration of a case in which technical advice has been provided.

of the Internal Revenue Code.

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